Supreme Court, U.S.
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IN THE
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2005

SCOTT MURRAY; MICHAEL SCHNEIDER; KEVIN JOSEPH, the class of all students at the University of Colorado at Boulder who are being charged out-of-state tuition despite being residents and domiciliaries of the State of Colorado,

*Petitioners,*

v.

STATE OF COLORADO; UNIVERSITY OF COLORADO BOARD OF REGENTS,

*Respondents*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Civil Rights Act of 1871 and the Fourteenth Amendment abrogate the immunity of the State of Colorado.

2. Whether the Board of Regents of the University of Colorado is immune from suit under the Civil Rights Act of 1871.

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*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 6, 2005.

## OPINION BELOW

The opinion of the Court of Appeals, reported at 2005 U.S. App. LEXIS 19245, appears in the appendix.

## JURISDICTION

The judgment of the court of appeals for the Tenth Circuit was entered on September 6, 2005. A timely petition for rehearing *en banc* was denied on October 4, 2005, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

## STATUTORY PROVISION INVOLVED

### 42 U.S.C. § 1983. Civil action for deprivation of rights (Civil Rights Act of 1871)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

Petitioners brought this action under 42 U.S.C. §1983. The respondents filed a motion to dismiss. The district court granted the motion. The district court ruled that petitioners did not have standing, and that the respondents were immune

from suit under the Eleventh Amendment to the Constitution of the United States. App.6. The Tenth Circuit affirmed, holding that respondents were immune from suit. App.1.

Individual petitioners, and the members of the class that they represent, graduated from high schools outside the State of Colorado. ¶12 of the Complaint. They moved to Colorado and have become citizens of the State of Colorado. They are all over the age of eighteen, but under the age of twenty-two, and have registered to vote in Colorado. App. 7, ¶¶3, 10 of the Complaint, App.7. Petitioners pay taxes in Colorado, have obtained drivers' licenses in the state and have registered vehicles in the States of Colorado. App.7, ¶¶4, 10 of the Complaint, App.7. Plaintiffs are not financially independent of their parents who reside outside the state of Colorado. App.7.

The State of Colorado treats two classes of its citizens differently. If a student at the University of Colorado graduated from a high school in the state of Colorado he or she automatically is allowed to pay in-state tuition. In-state tuition ranges from $4,020 to $5,081, while out-of-state tuition is $20,345 to $22,506, about five times as much. App. 7, 8, ¶¶18, 19 of the Complaint.

The state of Colorado contributes only $58.6 million per year to the University of Colorado as compared to $226 million paid for by the United States government. App. 8, ¶¶22, 25 of the Complaint. Out-of-state students pay approximately $175 million of the total costs of the University of Colorado and thus subsidize in-state students. ¶21 of the Complaint.

Those paying out-of-state rates are paying three times the amount that the state of Colorado is paying to support the University of Colorado. In other words, the University of Colorado, which has approximately one-third of its student body from out-of-state, exploits and profits from those out-of-state students.

Petitioners did not file an application with the University of Colorado for a determination that they were entitled to in-state benefits, because under state law they were ineligible. Petitioners admitted that they did not attend high school in Colorado, that they are under twenty-two years of age and that they are dependent on their parents. To insist that they apply for benefits that the University of Colorado is required to deny by the State of Colorado, is absurd. To make petitioners apply for benefits that they are statutorally ineligible for would require a futile and wasteful act.

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

Congress abrogated Colorado's immunity when it passed the Civil Rights Act of 1871. Justice Breyer noted recently that the 14th Amendment is the only recognized authority for abrogation. *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996). *Active Liberty*, Justice Stephen Breyer, at 143, note 4. Alfred A. Knopf, 2005.

The Fourteenth Amendment provides:

> ***No state*** shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; ***Nor shall any state*** deprive any person of life, liberty or property without due process of law; ***nor deny to any person within its jurisdiction the equal protection of the laws.*** (emphasis added.)

The Fourteenth Amendment was clearly and unequivocally aimed at the states. As Justice Breyer noted, *supra*, this amendment, and the laws implementing it like the Civil Rights Act of 1871, abrogate immunity of the states.

Justice Scalia finds that:

> The evidence suggests that [in statutory/constitutional interpretation] we do not really look for subjective legislative intent. We look for a sort of 'objectified' intent the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*. . . . It is the *law* that governs, not the intent of the lawgiver. *A Matter of Interpretation: Federal Courts and the Law, Antonin Scalia* (Princeton University Press, 1997) at *17*.

The objectified intent of the Fourteenth Amendment is that it applies directly to the states, and that laws implementing the Amendment abrogate the immunity of the states. That was the clear objective intent of the text of the Amendment and of the Civil Rights Act of 1871.

The Tenth Circuit ruled that Colorado and the Board of Regents of the University of Colorado are immune from suit. This is directly contrary to decisions of this court and directly contrary to the Fourteenth Amendment.

Congress has the power to abrogate the sovereign immunity of the states and their subdivisions. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

In the context of residency requirements of state universities, the Supreme Court has consistently ruled that the Civil Rights Act of 1871 allows lawsuits challenging discriminatory tuition schemes. *Vlandis v. Kline*, 412 U.S. 441 (1973); *Toll v. Moreno*, 441 U.S. 458 (1979); *Elkins v. Moreno*, 435 U.S. 647 (1978).

In *Vlandis*, the court noted:

> Appellees then brought suit in the District Court pursuant to the Civil Rights Act of 1871, 42 U. S. C. § 1983, contending that

> they were bona fide residents of Connecticut, and that § 126 of Public Act No. 5, under which they were classified as nonresidents for purposes of their tuition and fees, infringed their rights to due process of law and equal protection of the laws, guaranteed by the Fourteenth Amendment to the Constitution. 1973 U.S. LEXIS 55 at 4.

This court struck down as unconstitutional the Connecticut law that appellees in that case were challenging. The *Vlandis* court conclusively ruled that university officials were not immune from suit under the Civil Rights Act of 1871.

Under the Supreme Court's ruling in *Saenz v. Roe*, 526 U.S. 489 (1999), states do not have the right to determine who is, and who is not, a citizen of the state. Citizens have the right to choose the state of their domicile.

The state of Colorado has no right to discriminate against new residents of the state in favor of those who have lived in Colorado for many years. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court said such discrimination:

> would logically permit the State to bar new residents from ***schools***, parks, and libraries or deprive them of police and fire protection. Indeed, it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services. 394 U.S. at 632-633 (emphasis added).

The state of Colorado is attempting to bar or limit new residents from attending the University of Colorado by its scheme to require students who graduated from high schools

in other states to jump through impossible hoops before allowing them to become full residents of the state of Colorado. This violates the Supreme Court's rulings in *Shapiro* and *Vlandis*, *supra*.

Colorado's one-year absence requirement presents a different question. The Supreme Court upheld a one-year residency requirement in *Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn. 1970) summarily affirmed, 401 U.S. 985 (1971). However, in the *Vlandis* decision, *supra*, Justices Marshall and Brennan wrote in their concurring opinion:

> But I now have serious questions as to the validity of that summary decision (*Starns v. Malkerson*) in light of well-established principles, under the Equal Protection Clause of the Fourteenth Amendment, which limit the States' ability to set residency requirements for the receipt of rights and benefits bestowed upon bona fide state residents. See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

This court has recently ruled that durational residency requirements are unconstitutional. *Saenz v. Roe*, 526 U.S. 489 (1999). In the *Saenz* case, the Supreme Court struck down as unconstitutional a California statute that limited welfare benefits for the first year of residency in the state. The court ruled that the right to travel prohibited states from denying travelers "who elect to become permanent residents, the right to be treated like other residents of the state." 526 U.S. at 500. The court explained:

> Citizens of the United States, whether rich or poor, have the right to choose to be citizens "of the State wherein they reside." U.S. Const. Amdt. 14, §1. ***The States, however,***